

APPENDIX

Proposed Open Video System Rules

(c) *Burden of proof in discrimination disputes.* In disputes regarding whether the open video system operator has violated any provision of this part or Section 653 of the Telecommunications Act of 1996 prohibiting discrimination against any video programming providers, a complaining party shall allege with particularity and shall support by substantial evidence accompanying said complaint the following: (1) that the operator intentionally treated it substantially differently from other, similarly-situated video programming providers, including the operator or its affiliates, (2) that such discriminatory treatment was commercially unreasonable, and (3) that such discriminatory treatment caused the complaining party actual and substantial harm in its commercial interests. The Commission will dismiss complaints not complying with this subsection on its own motion or on the motion of the defendant.

(d) *Notice required prior to filing of complaint.* Any aggrieved party intending to file a complaint under this section must first notify the potential defendant open video system operator that it intends to file a complaint with the Commission based on actions alleged to violate one or more of the provisions contained in this part or in Section 653 of the Communications Act. The notice must be in writing and must be sufficiently detailed so that its recipient(s) can determine the specific nature of the potential complaint. The potential complainant must allow a minimum of ten (10) days for the potential defendant(s) to respond before filing a complaint with the Commission.

(e) *General pleading requirements.* Complaint proceedings under this part are generally resolved on a written record consisting of a complaint, answer, and reply, but may also include other written submissions such as briefs and written interrogatories. All written submissions, both substantive and procedural, must conform to the following standards :

(1) Pleadings must be clear, concise, and explicit. All matters concerning a claim, defense or requested remedy, should be pleaded fully and with specificity.

(2) Pleadings must contain facts which, if true, are sufficient to constitute a violation of the Communications Act or of this part, or a defense to such alleged violation.

(3) Facts must be supported by relevant documentation or affidavit.

(4) Legal arguments must be supported by appropriate judicial, Commission, or statutory authority.

(5) Opposing authorities must be distinguished.

(6) Copies must be provided of all non-Commission authorities relied upon which are not routinely available in national reporting systems, such as unpublished decisions or slip opinions of courts or administrative agencies.

(7) Parties are responsible for the continuing accuracy and completeness of all information and supporting authority furnished in a pending complaint

APPENDIX
Proposed Open Video System Rules

proceeding. Information submitted, as well as relevant legal authorities, must be current and updated as necessary and in a timely manner at any time before a decision is rendered on the merits of the complaint.

(f) Complaint.

(1) A complaint filed under this part shall contain:

(A) The name of the complainant and each defendant;
(B) The type of entity that describes complainant (i.e., individual, private association, partnership, or corporation), the address and telephone number of the complainant, and the address and telephone number of each defendant;

(C) The name, address and telephone number of complainant's attorney, if complainant is represented by counsel;

(D) Citation to the section of the Communications Act and/or this part alleged to have been violated;

(E) A complete statement of facts, which, if proven true, would constitute such a violation;

(F) Any evidence that supports the truth or accuracy of the alleged facts;

(G) Evidence that the complainant provides video programming and (1) that the operator intentionally treated it substantially differently from other, similarly-situated video programming providers, including the operator or its affiliates, (2) that such discriminatory treatment was commercially unreasonable, and (3) that such discriminatory treatment caused the complaining party actual and substantial harm in its commercial interests.

(H) If discrimination in rates, terms, and conditions of carriage is alleged, documentary evidence such as a rate card or a programming contract that demonstrates a differential in price, terms or conditions between complainant and a competing video programming provider or, if no programming contract or rate card is submitted with the complaint, an affidavit signed by an officer of complainant alleging that a differential in price, terms or conditions exists, a description of the nature and extent (if known or reasonably estimated by the complainant) of the differential, together with a statement that defendant refused to provide any further specific comparative information;

(I) If a programming contract or a rate card is submitted with the complaint in support of the alleged violation, specific references to the relevant provisions therein; and

(J) The specific relief sought.

APPENDIX
Proposed Open Video System Rules

(3) The following format may be used in cases to which it is applicable, with such modifications as the circumstances may render necessary:

Before The Federal Communications Commission, Washington, DC 20554

In the Matter of Complainant

v.

File No. (To be inserted by the Commission)

Defendant.

[Insert Subject/Nature of Issue: Unjust or Unreasonable Discrimination in Rates, Terms, and Conditions; Discriminatory Denial of Carriage]

Open Video System Complaint

To: The Commission.

The complainant (here insert full name of complainant and type of entity of such complainant):

1. (Here state the complainant's post office address and telephone number).
2. (Here insert the name, address and telephone number of each defendant).
3. (Here insert fully and clearly the specific act or thing complained of, together with such facts as are necessary to give full understanding of the matter, including relevant legal and documentary support).

Wherefore, complainant asks (here state specifically the relief desired).

(Date)

(Name of complainant)

(Name, address, and telephone number of attorney, if any)

(4) The complaint must be accompanied by appropriate evidence demonstrating that the required notification pursuant to paragraph (d) of this section has been made.

(g) *Answer.*

(1) Any open video system operator upon which a complaint is served under this section shall answer within thirty (30) days of service of the complaint, unless otherwise directed by the Commission.

(2) The answer shall advise the parties and the Commission fully and completely of the nature of any and all defenses, and shall respond specifically

APPENDIX
Proposed Open Video System Rules

to all material allegations of the complaint. Collateral or immaterial issues shall be avoided in answers and every effort should be made to narrow the issues. Any defendant failing to file and serve an answer within the time and in the manner prescribed by these rules may be deemed in default and an order may be entered against defendant in accordance with the allegations contained in the complaint.

(3) The answer shall state concisely any and all defenses to each claim asserted and shall admit or deny the averments on which the adverse party relies. If the defendant is without knowledge or information sufficient to form a belief as to the truth of an averment, the defendant shall so state and this has the effect of a denial. When a defendant intends in good faith to deny only part of an averment, the answer shall specify so much of it as is true and shall deny only the remainder. The defendant may make its denials as specific denials of designated averments or paragraphs, or may generally deny all the averments except such designated averments or paragraphs as the defendant expressly admits. When the defendant intends to controvert all averments, the defendant may do so by general denial.

(4) Averments in a complaint are deemed to be admitted when not denied in the answer.

(5) An answer to a discrimination complaint shall state the reasons for any differential in prices, terms or conditions between the complainant and its competitor, and shall specify the particular justification relied upon in support of the differential.

(A) When responding to allegations concerning price discrimination, except in cases in which the alleged price differential is de minimis (less than or equal to five cents per subscriber or five percent, whichever is greater), the defendant shall provide evidence to support any argument that the magnitude of the differential is not discriminatory.

(B) In cases involving a price differential of less than or equal to five cents per subscriber or five percent, whichever is greater, the answer shall identify the differential as de minimis and state that the defendant is therefore not required to justify the magnitude of the differential.

(C) If the defendant believes that the complainant and its competitor are not sufficiently similar, the answer shall set forth the reasons supporting this conclusion, and the defendant may submit an alternative contract for comparison. The answer shall state the defendant's reasons for any differential between the prices, terms and conditions between the complainant and such other programmer, and shall specify the particular justifications relied upon in support of the differential. The defendant shall also provide with its answer any written documentary evidence as may be available to support its justification of

APPENDIX
Proposed Open Video System Rules

the magnitude of any price differential between the complainant and such other programmer that is not de minimus.

(D) Any documents or contracts submitted pursuant to this subparagraph may be protected as proprietary pursuant to paragraph (k) of this section.

(6) An answer to a complaint alleging an unjust or unreasonable refusal to provide carriage shall state the defendant's reasons for refusing to carry the programming of the complainant, or for refusing to carry the complainant's programming on the same terms and conditions as complainant's competitor, and shall specify why the defendant's actions are not discriminatory.

(h) *Reply.* Within twenty (20) days after service of an answer, the complainant may file and serve a reply which shall be responsive to matters contained in the answer and shall not contain new matters. Failure to reply will not be deemed an admission of any allegations contained in the answer, except with respect to any affirmative defense set forth therein. Replies containing information claimed by defendant to be proprietary under paragraph (k) of this section shall be submitted to the Commission in confidence pursuant to the requirements of Section 0.459 of this chapter and clearly marked "Not for Public Inspection." An edited version removing all proprietary data shall be filed with the Commission for inclusion in the public file within five (5) days from the date the unedited reply is submitted, and shall be served on the defendant.

(i) *Motions.* Except as provided in this section, or upon a showing of extraordinary circumstances, additional motions or pleadings by any party will not be accepted.

(j) *Discovery.*

(1) The Commission staff may in its discretion order discovery limited to the issues specified by the Commission. Such discovery may include answers to written interrogatories or document production.

(2) The Commission staff may in its discretion direct the parties to submit discovery proposals, together with a memorandum in support of the discovery requested. Such discovery requests may include answers to written interrogatories, document production or depositions. The Commission staff will then hold a status conference with the parties, pursuant to paragraph (m) of this section, to determine the scope of discovery. If the Commission staff determines that extensive discovery is required or that depositions are warranted, the staff will advise the parties that the proceeding will be referred to an administrative law judge in accordance with paragraph (p) of this section.

(k) *Confidentiality of proprietary information.*

APPENDIX

Proposed Open Video System Rules

(1) Any materials generated or provided by a party in connection with the pre-complaint notification procedure required under subsections (b) and (d) hereof and in the course of adjudicating a complaint under this provision may be designated as proprietary by that party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b). Any party asserting confidentiality for such materials shall so indicate by clearly marking each page, or portion thereof, for which a proprietary designation is claimed. If a proprietary designation is challenged, the party claiming confidentiality will have the burden of demonstrating, by a preponderance of the evidence, that the material designated as proprietary falls under the standards for nondisclosure enunciated in the FOIA.

(2) Except as provided in paragraph (k)(3) of this section, materials marked as proprietary may be disclosed solely to the following persons, only for use in prosecuting or defending a party to the complaint action, and only to the extent necessary to assist in the prosecution or defense of the case:

(A) Counsel of record representing the parties in the complaint action and any support personnel employed by such attorneys;

(B) Officers or employees of the opposing party who are named by the opposing party as being directly involved in the prosecution or defense of the case;

(C) Consultants or expert witnesses retained by the parties;

(D) The Commission and its staff; and

(E) Court reporters and stenographers in accordance with the terms and conditions of this section.

(3) The Commission will entertain, subject to a proper showing, a party's request to further restrict access to proprietary information as specified by the party. The opposing party will have an opportunity to respond to such requests.

(4) The persons designated in paragraphs (k) (2) and (3) of this section shall not disclose information designated as proprietary to any person who is not authorized under this section to receive such information, and shall not use the information in any activity or function other than the prosecution or defense in the case before the Commission. Each individual who is provided access to the information by the opposing party shall sign a notarized statement affirmatively stating, or shall certify under penalty of perjury, that the individual has personally reviewed the Commission's rules and understands the limitations they impose on the signing party.

(5) No copies of materials marked proprietary may be made except copies to be used by persons designated in paragraphs (k) (2) or (3) of this

APPENDIX

Proposed Open Video System Rules

section. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided.

(6) Upon termination of the complaint proceeding, including all appeals and petitions, all originals and reproductions of any proprietary materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the complaint proceeding, any notes or other work product derived in whole or in part from the proprietary materials of an opposing or third party shall be destroyed.

(l) Other required written submissions.

(1) The Commission may, in its discretion, require the parties to file briefs summarizing the facts and issues presented in the pleadings and other record evidence. These briefs shall contain the findings of fact and conclusions of law which that party is urging the Commission to adopt, with specific citations to the record, and supported by relevant authority and analysis.

(2) The Commission may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceeding, including copies of all contracts and documents reflecting arrangements and understandings alleged to violate the requirements set forth in the Communications Act and in this part, as well as affidavits and exhibits.

(3) Any briefs submitted shall be filed concurrently by both the complainant and defendant at such time as is designated by the staff. Such briefs shall not exceed fifty (50) pages.

(4) Reply briefs may be submitted by either party within twenty (10) days from the date initial briefs are due. Reply briefs shall not exceed thirty (30) pages.

(5) Briefs containing information which is claimed by an opposing or third party to be proprietary under paragraph (k) of this section shall be submitted to the Commission in confidence pursuant to the requirements of Section 0.459 of this chapter, and shall be clearly marked "Not for Public Inspection." An edited version removing all proprietary data shall be filed with the Commission for inclusion in the public file within five (5) days from the date the unedited version is submitted and served on opposing parties.

(m) Status conference.

(1) In any complaint proceeding under this part, the Commission staff may in its discretion direct the attorneys and/or the parties to appear for a conference to consider:

(A) Simplification or narrowing of the issues;

APPENDIX
Proposed Open Video System Rules

(B) The necessity for or desirability of amendments to the pleadings, additional pleadings, or other evidentiary submissions;

(C) Obtaining admissions of fact or stipulations between the parties as to any or all of the matters in controversy;

(D) Settlement of the matters in controversy by agreement of the parties;

(E) The necessity for and extent of discovery, including objections to interrogatories or requests for written documents;

(F) The need and schedule for filing briefs, and the date for any further conferences; and

(G) Such other matters that may aid in the disposition of the complaint.

(2) Any party may request that a conference be held at any time after the complaint has been filed.

(3) Conferences will be scheduled by the Commission at such time and place as it may designate, to be conducted in person or by telephone conference call.

(4) The failure of any attorney or party, following reasonable notice, to appear at a scheduled conference will be deemed a waiver and will not preclude the Commission from conferring with those parties or counsel present.

(5) During a status conference, the Commission staff may issue oral rulings pertaining to a variety of interlocutory matters relevant to the conduct of the complaint proceeding including, inter alia, procedural matters, discovery, and the submission of briefs or other evidentiary materials. These rulings will be promptly memorialized in writing and served on the parties. When such rulings require a party to take affirmative action not subject to deadlines established by another provision of this part, such action will be required within ten (10) days from the date of the written memorialization unless otherwise directed by the staff.

(n) Specifications as to pleadings, briefs, and other documents; subscriptions.

(1) All papers filed in a complaint proceeding under this part must be drawn in conformity with the requirements of Sections 1.49 and 1.50 of this chapter.

(2) All averments of claims or defenses in complaints and answers shall be made in numbered paragraphs. The contents of each paragraph shall be limited as far as practicable to a statement of a single set of circumstances. Each claim founded on a separate transaction or occurrence and each affirmative defense shall be separately stated to facilitate the clear presentation of the matters set forth.

APPENDIX

Proposed Open Video System Rules

(3) The original of all pleadings and submissions by any party shall be signed by that party, or by the party's attorney. Complaints must be signed by the complainant. The signing party shall state his or her address and telephone number and the date on which the document was signed. Copies should be conformed to the original. Except when otherwise specifically provided by rule or statute, pleadings need not be verified. The signature of an attorney or party shall be a certificate that the attorney or party has read the pleading, motion, or other paper; that to the best of his or her knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that it is not interposed for any improper purpose. If any pleading or other submission is signed in violation of this provision, the Commission shall upon motion or upon its own initiative impose upon the party an appropriate sanction. Where the pleading or submission is signed by counsel, the provisions of Sections 1.52 and 1.24 of this chapter shall also apply.

(o) Copies; service.

(1) The complainant shall file an original plus three copies of the complaint with the Commission. However, if the complaint is addressed against multiple defendants, complainant shall provide three additional copies of the complaint for each additional defendant.

(2) An original plus two copies shall be filed of all pleadings and documents other than the complaint.

(3) The complainant shall serve the complaint on each defendant at the same time that it is filed at the Commission.

(4) All subsequent pleadings and briefs, as well as all letters, documents or other written submissions, shall be served by the filing party on all other parties to the proceeding, together with proof of such service in accordance with the requirements of Section 1.47 of this chapter.

(5) The parties to any complaint proceeding brought pursuant to this section may be required to file additional copies of any or all papers filed in the proceeding.

(p) Referral to administrative law judge.

(1) After reviewing the complaint, answer and reply, and at any stage of the proceeding thereafter, the Commission staff may, in its discretion, designate any complaint proceeding for an adjudicatory hearing before an administrative law judge.

(2) Before designation for hearing, the staff shall notify, either orally or in writing, the parties to the proceeding of its intent to so designate, and the parties

APPENDIX
Proposed Open Video System Rules

shall be given a period of ten (10) days to elect to resolve the dispute through alternative dispute resolution procedures, or to proceed with an adjudicatory hearing. Such election shall be submitted in writing to the Commission.

(3) Unless otherwise directed by the Commission, or upon motion by the Cable Services Bureau Chief, the Cable Services Bureau Chief shall not be deemed to be a party to a complaint proceeding designated for a hearing before an administrative law judge pursuant to this paragraph.

(q) *Petitions for reconsideration.* Petitions for reconsideration of interlocutory actions by the Commission's staff or by an administrative law judge will not be entertained. Petitions for reconsideration of a decision on the merits made by the Commission's staff should be filed in accordance with Sections 1.104-1.106 of this chapter.

(r) *Interlocutory review.*

(1) Except as provided below, no party may seek review of interlocutory rulings until a decision on the merits has been issued by the staff or administrative law judge.

(2) Rulings listed in this paragraph are reviewable as a matter of right. An application for review of such ruling may not be deferred and raised as an exception to a decision on the merits.

(A) If the staff's ruling denies or terminates the right of any person to participate as a party to the proceeding, such person, as a matter of right, may file an application for review of that ruling.

(B) If the staff's ruling requires production of documents or other written evidence, over objection based on a claim of privilege, the ruling on the claim of privilege is reviewable as a matter of right.

(C) If the staff's ruling denies a motion to disqualify a staff person from participating in the proceeding, the ruling is reviewable as a matter of right.

(s) *Expedited review.*

(1) Any party to a complaint proceeding under this part aggrieved by any decision on the merits issued by the staff pursuant to delegated authority may file an application for review by the Commission in accordance with Section 1.115 of this chapter.

(2) Any party to a complaint proceeding aggrieved by any decision on the merits by an administrative law judge may file an appeal of the decision directly with the Commission, in accordance with Section 1.276(a) and Sections 1.277(a)-(c) of this chapter, except that unless a stay is granted by the

APPENDIX
Proposed Open Video System Rules

Commission, the decision by the administrative law judge will become effective upon release and will remain in effect pending appeal.

(t) *Frivolous complaints.* It shall be unlawful for any party to file a frivolous complaint with the Commission alleging any violation of this part. Any violation of this paragraph shall constitute an abuse of process subject to appropriate sanctions.

(u) *Statute of limitations.* Any complaint filed pursuant to this subsection must be filed within one year of the date on which the earliest of the following events occurs:

(1) The open video system operator enters into a contract with the complainant that the complainant alleges to violate one or more of the rules contained in this part; or

(2) The open video system operator offers to carry programming for the complainant pursuant to terms that the complainant alleges to violate one or more of the rules contained in this part; or

(3) The complainant has notified an open video system operator that it intends to file a complaint with the Commission based on a request for such operator to carry the complainant's programming on its open video system that has been unjustly or unreasonably denied or unacknowledged, allegedly in violation of one or more of the rules contained in this part.

(v) *Remedies for violations.*

(1) Remedies authorized. Upon completion of such adjudicatory proceeding, the Commission shall order appropriate remedies, including, if necessary, the establishment of prices, terms, and conditions for the provision of carriage to the aggrieved video programming provider. Such order shall set forth a timetable for compliance, and shall become effective upon release.

(2) Additional sanctions. The remedies provided in paragraph (s)(1) of this section are in addition to and not in lieu of the sanctions available under title V or any other provision of the Communications Act.